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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1083

EUGENE SCHAEFER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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The Petitioner, Eugene Schaefer, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 3, 1975.

OPINIONS BELOW

No formal opinion was rendered by the District Court. The opinion of the Court of Appeals has not yet been reported, and is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Court below was entered on January 3, 1975, and Petitioner's Motion for Rehearing En Banc was denied on January 29, 1975. (Appendix B infra, p. A-21) On February 12, 1975, the United States of America filed a Motion for Rehearing En Banc on another issue raised in this proceeding. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

Petitioner, along with seven others, was convicted on Count I of a violation of Title 18, Section 1955 (prohibiting illegal gambling business). As to this petitioner, the evidence shows that he did not share offices, phones, customers, profits or losses, or maintain any specific accounting or central bookkeeping system with the other seven defendants or exchange "line information"[1] from Defendant Lancaster to disseminate to other bettors.[2]

Trial Court found that Petitioner was a bookmaker.[3]

That of the eight defendants, the petitioner would only on occasion bet with Defendant Lancaster which the court found to be "layoff" bets. There was no pre-arranged agreement between Petitioner and Defendant Lancaster that bets had to be accepted by Petitioner. The questions presented are:

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[1] Line information refers to point spread on the various sporting events.

[2] See Finding of Fact and Conclusions of Law by Trial Judge (T. p. 298 paragraph 1 subsection b.).

[3] It was the contention of Petitioner that he is not a bookmaker since all of his bets were made on one side of a sporting event. (T. p. 365, Stipulation H (3))

1. Can an individual bettor, regardless if he is a bookmaker or not, who only receives line information for his own personal use and not to disseminate to others, and places voluntary bets with one bookmaker only, fuse himself into a single illegal business involving five or more persons as proscribed by 18 U.S.C. Section 1955 by making layoff bets only with the same person?

2. Does the failure of the Government to include in a trial Stipulation evidence which is in its possession and which contradicts the opinion of their expert witness that Petitioner did not "layoff bets" seriously impair Petitioner's right to a fair trial and was therefore "plain error" within the meaning of criminal rules providing that plain error affecting substantial rights may be noticed even though not brought to the attention of the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Title 18 U.S.C. Section 1955 provides:

> "(a) Whoever conducts, finances, manages, supervises, directs or owns, all or part of an illegal gambling business. . . .
>
> "(b) As used in this section—
>
> "(1) illegal gambling business means a gambling business which—
>
> * * *
>
> "(ii) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business."

2. The Fifth Amendment to the United States Constitution provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

3. The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

STATEMENT OF THE CASE

Petitioner was convicted, along with seven others, of a violation of Title 18, Section 1955 (Count I), and of a conspiracy to violate the same Section (Count II). The Court of Appeals for the Eighth Circuit affirmed Petitioner's conviction on Count I by a 2-1 vote, and unanimously reversed Count II. Petitioner's Motion for a Rehearing En Banc on Count I was denied on January 29, 1975. The United States of America, after receiving an extension of time, filed on February 12, 1975, a Motion for Rehearing En Banc on Count II. The Eighth Circuit has not yet ruled on the Government's Motion for Rehearing.

The case at trial was presented almost entirely by Stipulation, which came from evidence obtained from a wiretap on the telephone of Defendant Lancaster.

The Stipulation set forth that each defendant, other than Petitioner, operated a gambling business in St. Louis, Missouri. As to Petitioner, it was stipulated he made personal bets from his home using his telephone. All conversations with Defendant Lancaster were for the purpose of making a personal bet. If Petitioner was to make a bet with Defendant Lancaster, it was necessary to receive line information. At no time did Petitioner formulate a line for the mutual benefit of himself and Defendant Lancaster, or disseminate line information received from Defendant Lancaster to other bettors, but was only for the purpose of making a personal bet to Defendant Lancaster.

It was the Government's contention that Petitioner was a bookmaker and he utilized the line provided to him by Defendant Lancaster to formulate and to disseminate line to those customers of the business with whom he dealt directly; and that Petitioner exchanged layoff bets with Defendant Lancaster.

The only link between Petitioner and the other seven separate bookmaking operators was Petitioner's betting with Defendant Lancaster which the trial court found to be "layoff bets."[4]

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[4] See Finding of Facts and Conclusions of Law by Trial Judge, p. 299 paragraph (d). As to the ruling of trial court on exchange of line information to bet with others, see footnote 2.

REASONS FOR GRANTING THE WRIT

There are three compelling reasons for granting the Writ of Certiorari. First, to insure that Federal jurisdiction will not extend beyond that intended by Congress. Second, to define and interpret the vague statutory provisions as to the application of Section 1955. Third, to protect the right of an accused to due process of law.

1. The ruling of the Eighth Circuit Court of Appeals has expanded Federal Government Criminal Powers so as to rival the power of the states to regulate localized gambling operations.

Two Judges, Heaney and Lay, of the Eighth Circuit have dissented in separate cases in opinions issued on the same day.[5] Judge Lay in his opinion in the Schaefer case states:

> "Congress did not intend by the enactment of No. 1955 to expand federal criminal law so as to rival the power of the states to regulate localized gambling operations."

The majority and dissent in the instant opinion differ as to whether a single "business" existed here. It is clear, from the legislative history that Congress intended that prosecution of those gambling enterprises whose profits flowed to syndicated crime. See United States v. Sacco, 491 F. 2d 995, 998-99 (9th Cir. 1974) (en banc).

Judge Lay's opinion properly concludes that the "business" which Congress intended to cover is not present in the instant case.

The Government admitted at oral argument that the exchange of line information did not make an individual operation into

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[5] Judge Heaney dissented in United States v. Thomas et al., No. 73-1490, concurring with Judge Lay in this case.

a unified business (p. A-13), the majority nevertheless concluded that the exchange of layoff bets made their eight separate businesses into a single gambling business for the purpose of Section 1955.

Section 1955 had a very specific and important purpose which is to punish massive syndicated gambling operations of organized crime and underworld institutions.

If the majority's decision is allowed to stand the federal courts will have the responsibilities for the prosecution of every local and petty gambling activity.

2. It is of critical importance to define and interpret the definition of "business" and "five or more persons." These points are basic to the application of Section 1955 and will continue to arise in every prosecution under this Section. For example, if Judges Lay and Heaney had constituted two of the three members on the same panel, both the decisions in this case and in United States v. Thomas, et al., No. 73-1490, which was decided on the same day would have been diametrically opposite.

3. If the Petitioner is guilty of fusing himself into a single illegal gambling business, it can only be for the reason of layoff bets with Defendant Lancaster.

The majority state in their written opinion:

> "While the evidence of layoff betting as to these men is not so strong, we are satisfied they were a part of the loose affiliation which, through continuous communication, conducted this gambling operation . . . Close examination of the transcribed conversations Lancaster had with Schaefer and Christophel discloses discourse which could be construed as layoff betting." (pp. A-8-9).

This opinion was reached without the benefit of a report from the Federal Bureau of Investigation, Washington, D. C. dated April 12, 1972. This report indicates Petitioner did not make "layoff bets" to Defendant Lancaster. (T. p. 269, U. S. Government's Brief p. 19). This report was prepared long after the date the alleged gambling business operated, and if there would have been a layoff bet at any time prior to the date of the report, certainly the report would have so indicated.

In Clay v. Black, 479 F. 2d 319 (6th Cir. 1973), the court held that the failure of the prosecution to make test available to the defense before trial denied his right to due process of law.

Admittedly, unlike the case of Clay v. Black, supra, the existence of the F.B.I. report was known before trial. Nevertheless, is it not the duty of the Government to inform the court in a non-jury case of the contents of this report which contains exculpatory evidence as to layoff bets? Petitioner is requesting that this court review the Government's failure to include in a trial Stipulation evidence which is in its possession and which contradicts the opinion of their expert witness that Petitioner did not "layoff bets." That the omission of the F.B.I. report seriously impaired Petitioner's right to a fair trial and was therefore "plain error" within the meaning of criminal rules providing that plain error affecting substantial rights may be noticed even though not brought to the attention of the Court.

It is of the utmost importance that this Court review the use of favorable evidence in the hands of the prosecution particularly when this omission deprives the Petitioner to a fair trial and his right to due process of law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted

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